

UNCLASSIFIED STATE 00112850

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SUBJECT: NEXT STEPS ON DOMA - GUIDANCE FOR POSTS

1. On June 26, 2013, the Supreme Court held Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. That decision has many immigration-related implications for same sex couples.

2. Beginning immediately, consular officers should review visa applications filed by a same-sex spouse in the same manner as those filed by an opposite-sex spouse, unless a specific provision of the federal immigration laws requires a different approach. The Visa Office (VO) deleted 9 FAM 40.1 N1.1 (a), which limited the word "marriage" for immigration purposes to mean "only a legal union between one man and one woman as husband and wife," and the word "spouse" to mean only "a person of the opposite sex who is a husband or a wife." A same-sex marriage is now valid for immigration purposes, as long as the marriage is recognized in the "place of celebration." A same-sex marriage is valid for immigration purposes even if the couple intends ultimately to reside in one of the 37 states that do not recognize same-sex marriages. The same-sex marriage is valid even if the applicant is applying in a country in which same-sex marriage is illegal.

Action Request

3. The Department asks consular sections to identify what types of marriages are available for same-sex couples in-country and update the reciprocity tables, pursuant to 9 FAM 41.105. This information will be useful for Department and USCIS colleagues adjudicating I-130 petitions.

New Nonimmigrant Visa Policy

4. Starting immediately, same-sex spouses and their children are equally eligible for NIV derivative visas. Same-sex spouses and their children (stepchildren of the primary applicant when the marriage takes place before the child turns 18) can qualify as derivatives where the law permits issuance of the visa to a spouse or stepchild without being named on a petition (or if a petition is not required). This would include: Diplomat (A), Commonwealth of the Northern Mariana Islands transitional worker (CW), treaty trader investor (E), international organization employee (G), temporary worker (H), information media representative (I), intracompany transferee (L), North Atlantic Treaty Organization (NATO), extraordinary ability (O), entertainer and athlete (P), religious worker (R), and North American Free Trade Agreement (TN) visa categories. If an applicant is otherwise qualified, he/she may be issued a derivative visa starting now.

5. Some NIV classifications require certain documentation before a visa issuance can take place. Same-sex spouses (and stepchildren) of F and M student visa applicants (F-2 and M-2) will need to obtain an I-20a prior to issuance. Spouses of exchange visitors (J-2) will need an approved DS-2019. Same-sex spouses of victims of criminal activity (U-2) and human trafficking victims (T-2) will require completed Supplement I-918s or I-914s respectively, before an officer

approves any derivative cases.

New Immigrant Visa Policy

6. A spouse of a U.S. citizen, as well as a spouse of a Lawful Permanent Resident (LPR) (when the priority date is current), may apply for an immigrant visa after USCIS approves the I-130. The validity of a marriage will depend on whether it was legally valid in the place of celebration, rather than the place of domicile. Stepchildren acquired through such marriages are eligible to the same extent as stepchildren acquired through opposite sex marriage. Same-sex spouses (and qualified children or stepchildren) can also qualify as dependents of employment-based categories and family-preference categories, and as follow-to-join derivatives.

7. Many same-sex couples live abroad in countries where they are unable to marry. Starting immediately, same-sex partners of U.S. citizens may apply for fiance nonimmigrant K-1 visas to wed in the United States. Once the union is contracted in a state permitting same-sex marriage, the foreign spouse may apply for adjustment to LPR status through USCIS, or the U.S. citizen may file an I-130 with USCIS. A significant portion of same-sex partners intending to immigrate to the United States may utilize fiance visas.

8. DV applicants may include same-sex spouses in their initial entry or add spouses acquired after their initial registration. Follow-to-join DV 2013 applicants must be issued before the end of FY 2013. Typically, DV applicants who did not include their spouse on their initial entry are disqualified. However, for DV 2013 and DV 2014, same-sex couples should not be automatically disqualified for not including their same-sex spouse (or stepchildren) on their original entry, since those persons were not recognized as spouses for U.S. immigration purposes at the time of the entry (though the officer should be alert to potential fraud, as with any case in which a spouse is acquired after initial registration).

Public Outreach

9. Posts may use the following points to respond to public and media inquiries as we work with the Department of Justice:

Now that the Supreme Court has found section 3 of the Defense of Marriage Act (DOMA) unconstitutional, the President has directed the Attorney General to work with other members of his Cabinet to review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly.

We recognize the significance of this decision for affected families, and we are working to implement policy and procedural changes as soon as possible.

Effective immediately, U.S. embassies and consulates can accept visa applications filed on behalf of same-sex spouses.

The Department of State is working with the Department of Justice to review all relevant federal statutes and regulations that

affect visa processing and immigration benefits.

For more information on submitting a visa application,
please visit travel.state.gov/visa

11. Minimize considered.

Kerry

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